

DE 00-162

ISO NEW ENGLAND, INC.

Regional Electric Industry Marketing Reports

Order on Motions for Confidential Treatment

O R D E R N O. 23,788

September 28, 2001

The New Hampshire Public Utilities Commission

(Commission) opened this docket in 2000 to consider certain requests by ISO New England, Inc. (the ISO) for confidential treatment under RSA 91-A:5 of certain data voluntarily shared by the ISO with the Commission. On November 20, 2000, we issued Order No. 23,590, granting the confidentiality requests then on file. Now pending are additional and similar requests for confidential treatment.

Consistent with Order No. 888 of the Federal Energy Regulatory Commission and subsequent directives of that agency relative to the restructuring of the nation's wholesale electricity industry, ISO New England is the independent system operator charged with the direction and control over the electricity grid in the six New England states as well as the associated wholesale electricity markets. *See generally New England Power Pool*, 79 FERC ¶ 61,374 (1997) (provisionally approving formation of ISO), *New England Power Pool*, 85 FERC ¶ 61,379 (1998) (conditionally accepting market rules), on

rehearing 87 FERC ¶ 61,045 (1999);¶ and subsequent orders including, most recently, *ISO New England, Inc.*, 96 FERC 61,228 (2001) (clarifying status of ISO's congestion management and "multi-settlement system" market improvement initiatives), and *Regional Transmission Organizations*, 96 FERC ¶ 63,037 (2001) (comprising mediator's recommendations to FERC regarding formation of single northeastern Regional Transmission Organization to replace ISO New England and its counterparts in New York and Pennsylvania-New Jersey-Maryland region). As such, the ISO is primarily regulated at the federal level and in a broad sense is a co-participant with this and other state regulatory agencies in efforts to assure that federal regulation of the electric industry is effective, protective of the public interest and consistent with reasoned concepts of federalism. As the two most recent FERC orders cited above make clear, this effort is at a critical stage - and, thus, the need for effective cooperation between the ISO and the relevant state regulatory agencies in New England is significant.

In Order No. 23,590, we concluded that it would be consistent with the New Hampshire Right-to-Know law, RSA Chapter 91-A, to treat as confidential and not open to public inspection certain market-sensitive data furnished to the

Commission on a voluntary basis by the ISO. See Order No. 23,590, slip op. at 6 (recognizing "distinction between information obtained by state agencies through the exercise of their authority and information that is useful to state agencies but provided to them on a voluntary basis"). At issue is the exception to the general rule of public disclosure, provided for "confidential, commercial or financial information." RSA 91-A:5, IV. Interpreting this provision, the New Hampshire Supreme Court has instructed agencies of state government to interpret this exemption narrowly, applying a balancing test in order to determine whether "the asserted private, confidential, commercial or financial interest" is outweighed by "the public's interest in disclosure." *Union Leader Corp. v. New Hampshire Housing Fin. Auth.*, 142 N.H. 540, 552-53 (1997). We applied this balancing test to determine that non-disclosure was appropriate with regard to competitively sensitive bidding information obtained by the ISO pursuant to its FERC-approved market rules and voluntarily provided by the ISO to the Commission. Order No. 23,590, slip op. at 5-8.

Subsequent to Order No. 23,590, the ISO has provided three documents to the Commission to which were appended requests for confidential treatment. On February 1, 2001, the

ISO submitted quarterly market reports covering the period from November 1999 through April 2000. On March 9, 2000, the ISO submitted two similar reports covering the period from May 2000 through October 2000. And on May 11, 2001, the ISO submitted its market report covering the November 2000 through January 2001 quarter. In each instance, the ISO furnished a redacted copy of the quarterly reports along with an unredacted version, the latter identifying bids from energy suppliers that were subject to mitigation under ISO's market rules because the relevant energy was dispatched for reasons of transmission congestion rather than pursuant to the competitive pricing principles that ordinarily govern the regional electricity market. The Commission has received no objections to these requests for confidential treatment.

Accordingly, and based on our reasoning in Order No. 23,590, we will treat the unredacted versions of the quarterly reports as confidential to the extent that they remain subject to similar treatment in the FERC's files. See Order No. 23,590, slip op. at 8 (noting FERC determination that bid data should remain confidential for six months only). Based on this determination, none of the quarterly reports that are subject to pending requests are appropriate for confidential treatment because in each instance the bid data is more than

six months old.

However, we deem it appropriate to make an additional determination. We believe it is crucial to our efforts to monitor the effectiveness of the regional market superintended by ISO for this agency to continue to receive market data - including competitively sensitive data with respect to individual bids - in a timely manner. It discourages rather than facilitates the receipt of this information for us to require the ISO, every time it provides such a report to the Commission, to include a formal motion for confidential treatment. Similarly, given that the relevant legal principle is already fully established by Order No. 23,590, it is wasteful of administrative resources for us to issue a separate order each time the ISO provides such a report. Accordingly, we will henceforth assume that any data as to individual bids in the ISO market that is less than six months old and is furnished to the Commission should be treated as confidential. Rather than append a motion for confidential treatment to each such submission, the ISO may simply indicate in a cover letter that it is relying on this Order to provide the document on a confidential basis. We make this ruling subject to our understanding that (1) the ISO will continue to provide both redacted and unredacted versions

of such reports, with the unredacted version including all information other than that which would specifically be exempt from disclosure, (2) redacted versions of the documents will be treated as public by us as soon as they would be subject to such treatment by the FERC, i.e., once the data is six months old and (3) the ISO will act in good faith and inform the Commission of any change in the FERC's view of the confidentiality of competitively sensitive market data.

We further stress that this ruling, as with all determinations we make under RSA 91-A:5, is subject to our ongoing authority to reconsider the determination. We reserve this authority in part because we are mindful that, given the procedural context in which the pending requests arise, parties that might have an interest in seeking disclosure of otherwise-confidential data are not present to argue such a position. Allowing for the possibility of such advocacy is especially appropriate here, given the prospective exemption from disclosure that we today grant.

Based upon the foregoing, it is hereby

ORDERED, that the pending motions for confidential treatment of certain data provided to the Commission by ISO New England, Inc. concerning wholesale electricity bidders are DENIED as moot given that the data in question is more than

six months old; and it is

FURTHER ORDERED, that bid-specific data in quarterly reports provided to the Commission by ISO New England, Inc. in the future be treated as confidential to the same extent that the data would receive similar treatment by the Federal Energy Regulatory Commission; and it is

FURTHER ORDERED, that this Order is subject to the ongoing authority of the Commission, on its own motion or on the motion of Staff or any party or any other member of the public to reconsider this Order in light of RSA 91-A, should circumstances so warrant.

By order of the Public Utilities Commission of New Hampshire this twenty-eighth day of September, 2001.

Douglas L. Patch
Chairman

Susan S. Geiger
Commissioner

Nancy Brockway
Commissioner

Attested by:

Thomas B. Getz
Executive Director and Secretary